No. 96-354

Supreme Court, U.S.
FILED
OCT 8 1996

In The

Supreme Court of the United States

October Term, 1996

IN RE NORMAN BARDSLEY,

Petitioner,

vs.

POWELL, TRACHTMAN, LOGAN, CARRLE AND BOWMAN P.C., JOEL P. PERILSTEIN, JONATHAN K. HOLLIN, SCOTT E. BARDSLEY, LEIGH BARDSLEY, DAVID E. MILLER and INOFAST MANUFACTURING, INC.,

Respondents.

On Petition for Writ of Mandamus as Denied by the Court of Appeals for the Third Circuit (Docket No. 96-1224) by Order of April 12, 1996, and as Denied Upon a Motion for Rehearing in Banc, by Order Dated May 31, 1996, of a Motion Requesting the Issuance of a Preliminary Injunction Denied by the United States District Court for the Eastern District of Pennsylvania (Docket No. 95-2287) by the Order Dated February 12, 1996

RESPONDENTS' POWELL, TRACHTMAN, LOGAN, CARRLE & BOWMAN, P.C., JOEL P. PERILSTEIN AND JONATHAN K. HOLLIN BRIEF IN OPPOSITION

RICHARD K. MASTERSON
Counsel of Record
ANDREW L. BRAUNFELD
MASTERSON, BRAUNFELD, MAGUIRE & BROWN
Attorneys for Respondents Powell, Trachtman, Logan, Carrle & Bowman, P.C., Joel P. Perilstein and Jonathan K. Hollin
One Montgomery Plaza, #702
Swede and Airy Streets
Norristown, Pennsylvania 19401
(610) 277-1700

TABLE OF CONTENTS

	Page
Statement of the Case	1
Summary of Argument	4
Reasons for Denying the Writ	5
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953)	10
Cyprus Barn, Inc. v. Western Electric Co., 812 F.2d 1363 (11th Cir. 1987)	10
Fort Worth Nat. Corp. v. Federal Savings & Loan Ins. Corp., 469 F.2d 47 (5th Cir. 1972)	10
Kerr v. United States District Court, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976)	5
Mallard v. U.S. District Court, 440 U.S. 296, 109 S.Ct. 1814, 104 L. Ed. 2318 (1989)	8
Nottelson v. A.O. Smith Corp., 397 F.Supp. 928 (E.D. Wis. 1975)	10
Pas v. Travelers Ins. Co., 7 F.3d 349 (3d Cir. 1993)	8

Contents

	Page
Rapoport v. Banco Mexicano Somex, S.A., 668 F.2d 667 (2d Cir. 1982)	11
Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)	9, 10
Venezia v. Robinson, 16 F.3d 209 (7th Cir. 1994)	10
United States v. U.S. District Court, 858 F.2d 534, 99 A.L.R. Fed. 619 (9th Cir.)	8
Will v. United States, 389 U.S. 90 (1967)	7
Statutes Cited:	
15 U.S.C. § 78(cc)(B)	1
18 U.S.C. § 1964(c)	1
Rules Cited:	
Federal Rule of Civil Procedure 3	10
Supreme Court Rule 20.3(a)	10
Other Authority Cited:	
17 C.F.R. § F240.10(b)(5)	1

STATEMENT OF THE CASE

In his Statement of the Case, petitioner correctly asserts that, for purposes of the pending Writ of Mandamus, the issues are confined to the factual circumstances of petitioner's motion(s) for preliminary injunction filed in the trial court — all of which were denied. It is not clear in petitioner's Statement of the Case, however, that the motion(s) for preliminary injunction were filed in a case separate and apart from the one whose record is currently before the Court. Reference to petitioner's appeal to the Third Circuit Court of Appeals at page 3, paragraph 3 of petitioner's Brief can be confusing in this regard.

For the foregoing reason, this counter-statement of the case is provided which in itself should be dispositive of the issues raised by petitioner.

The action to which petitioner has annexed the instant Petition for Mandamus was instituted by petitioner Norman Bardsley through the filing of a Complaint on April 19, 1995. A temporary restraining order was refused. An Amended Complaint which included counts alleging violations under Section 10 of the Securities and Exchange Act and Securities and Exchange Commission Rule 10(b)(5) (17 C.F.R. § F240.10(b)(5)) promulgated thereunder; under Section 29(b) of the Securities and Exchange Act, 15 U.S.C. § 78(cc)(B) and Title 18 of the Racketeer Influenced and Corrupt Organization Act ("RICO") at United States Code § 1964(c) as well as under various pendant state law causes of action was filed on July 16, 1995. Contemporaneously with the filing of the Amended Complaint, petitioner filed a motion seeking preliminary injunctive relief. Petitioner-appellant Norman Bardsley is the brother of respondent, Scott E. Bardsley, and the son of respondent Leigh Bardsley. (The brothers will sometimes be

referred to hereinafter as "Norman" or "Scott".) Norman Bardsley essentially disputes that respondents Leigh Bardsley and David Miller are shareholders of Inofast.

After Norman Bardsley, Scott Bardsley and Leigh Bardsley were elected as directors of Inofast by vote of the four enumerated shareholders, Norman disputed the validity of certain actions taken by the Board of Directors. Norman, through the underlying suit, seeks control of Inofast.

A hearing on petitioner's motion for preliminary injunction was conducted before the Honorable J. Curtis Joyner of the District Court for the Eastern District of Pennsylvania on October 5, 1995. The request for preliminary injunction was denied by Order dated October 10, 1995. Norman thereafter renewed his motion for preliminary injunction and a second hearing was held on January 3, 1996. The renewed motion for preliminary injunction was also denied by the District Court on February 12, 1996.

By Order dated February 20, 1996, the District Court dismissed petitioner's Amended Complaint.[1]

Motions or requests for reconsideration of the Orders of the District Court denying the motion for preliminary injunction and dismissing the Complaint were denied by Orders of the District Court on March 11, 1996 and March 20, 1996. Norman Bardsley has appealed the Order of February 12, 1996, denying his motion for preliminary injunction as well as the Order of February 20, 1996, dismissing the Complaint. This appeal was filed with the United States Court of Appeals for the Third

---

1. The trial court's Memorandum and Order of February 12, 1996 is found at pp. 1a-8a of petitioner's Petition and is reported at 916 F. Supp. 454. The Memorandum and Order of February 20, 1996 is reported at 916 F. Supp. 458.

Circuit at **No. 96-1225**, on March 13, 1996. Activity was briefly stayed at this appeal pending the consideration and denial of petitioner's requests to the District Court for Reconsideration.

The instant Petition for Mandamus was docketed by the Third Circuit Court of Appeals at **No. 96-1224** on March 19, 1996. The docket reflects that the appeal from the trial court's orders referred to above are related cases, at No. 96-1225.

In his Petition for Mandamus addressed to the Third Circuit, while the notice of the aforesaid appeal was already pending, petitioner requested of the appellate court:

a. An expedited hearing on the merits of his appeal;

b. An order granting his request for a preliminary injunction (as opposed to an order requiring the District Court to grant such injunction); and

c. An order effecting the recusal of Judge Joyner, whom petitioner claimed as a matter of law was biased.

During the pendency of the appeal at 96-1225 and the Petition for Mandamus at 96-1224, petitioner filed two Petitions at 96-1225 for extraordinary relief, each redundant to requests already made in both actions, and both of which were denied on April 2, 1996, and April 10, 1996, respectively.

Subsequently, petitioner obtained counsel in the appeal at No. 96-1225 who has caused appellant's brief and reproduced record to be filed. All other briefs have subsequently been filed with the Court and argument on petitioner's appeal has been tentatively scheduled for the week of November 11, 1996. By Order of April 12, 1996, the Third Circuit Court of Appeals

denied the Writ of Mandamus in the instant case, and recognizing that its request for relief was identical to that requested in the appeal at No. 96-1225, referred the petition to the merits panel to be heard with the appeal at the latter number (p. 34a, petitioner's brief). The Third Circuit Court of Appeals denied petitioner's request for a rehearing on the mandamus petition on May 31, 1996 (p. 46a, petitioner's brief).

Despite the pendency of the Appeal at 96-1225, and despite the Circuit Court's referral of the mandamus petition to the merits panel so that the two identical requests for injunctive relief could be heard together, petitioner filed the instant petition for a Writ of Mandamus.

SUMMARY OF ARGUMENT

Petitioner, as the party seeking the drastic writ of mandamus, has not met his burden of proof in showing that his right to the issuance of the writ is clear and indisputable. Neither has petitioner shown that he has no other adequate means, such as a direct appeal, to attain the relief he desires, or that he has been damaged or prejudiced in a way not correctable on appeal, since the appeal he has already taken requesting the same relief sought here is pending before the Third Circuit Court of Appeals and ready for argument.

The District Court did not abuse its discretion in failing to issue a preliminary injunction, and acted within the normal course of its duty to decide issues properly before it. Similarly, the Court of Appeals did not abuse its discretion in refusing the Writ of Mandamus and denying two motions for extraordinary relief in the underlying case, and the Court acted within the course of its exercise of its jurisdiction to decide issues properly before it.

Petitioner is requesting this Court to order the issuance of an injunction in a case which has already been dismissed, and there is no court at present in which such underlying civil action lies. Even had an injunction been granted by the trial court, it would not have survived dismissal of the cause of action.

REASONS FOR DENYING THE WRIT

Disposition of the Petition for Mandamus requires a brief analysis of a mandamus action, especially at the level of the United States Supreme Court. In *Kerr v. United States District Court*, 426 U.S. 394, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976), the Court set forth the following explanation of its policy with regard to such requests:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953); *Ex parte Fahey*, 332 U.S. 258, 259 (1947). As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.;" *Will v. United States, supra*, at 95, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," *Will v. United States, supra*, at 95, the fact still remains that "only exceptional circumstances amounting to a

judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Ibid.*

Our treatment of mandamus within the federal court system as an extraordinary remedy is not without good reason. As we have recognized before, mandamus actions such as the one involved in the instant case "have the unfortunate consequence of making the [district court] judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. *Bankers Life & Cas. Co. v. Holland, supra,* at 384-385, quoting *Ex parte Fahey, supra,* at 260. More importantly, particularly in an era of excessively crowded lower court dockets, it is the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule "appellate review should be postponed . . . until after final judgment has been rendered by the trial court." *Will v. United States, supra,* at 96; *Parr v. United States,* 351 U.S. 513, 520-521 (1956)." A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

As a means of implementing the rule that the writ will issue only in extraordinary

> circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, *Roche v. Evaporated Milk Assn., supra,* at 26, and that he satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co. v. Holland, supra,* at 384, quoting *United States v. Duell,* 172 U.S. 576, 582 (1899); *Will v. United States, supra,* at 96. Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed. *Schlagenhauf v. Holder,* 379 U.S. 104, 112 n.8 (1964); *Parr v. United States, supra,* at 520. See also *Technitrol, Inc. v. McManus,* 405 F. 2d 84 (CA8 1968), cert. denied, 394 U.S. 997 (1969); *Pacific Car & Foundry Co. v. Pence,* 403 F.2d 949 (CA9 1968).

As opposed to the instant controversy which is based upon a struggle for control among three family members of a small business corporation, this Court has invoked the writ of mandamus in matters of monumental importance to the public. By way of example, this Court in *Will v. United States,* 389 U.S. 90, explained:

> Thus the writ has been invoked where unwarranted judicial action threatened "to embarrass the executive arm of the Government in conducting foreign relations," *Ex parte Peru,* 318 U.S. 578, 588

> (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland v. Soper,* 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States v. United States Dist. Court,* 384 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957); see *McCullough v. Cosgrave* 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James,* 272 U.S. 701, 706, 707 (1927) (dictum). And the party seeking mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 384 (1953); see *United States v. Duell,* 172 U.S. 576, 582 (1899).

See also, Mallard v. U.S. District Court, 440 U.S. 296, 309, 109 S.Ct. 1814, 1822, 104 L.Ed. 2318 (1989) and *Pas v. Travelers Ins. Co.,* 7 F.3d 349 (3d Cir. 1993).

In *United States v. U.S. District Court,* 858 F. 2d 534, 99 A.L.R. Fed. 619 (9th Cir.), the Ninth Circuit identified five factors to guide the exercise of the federal court's power of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she

> desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. . . . (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977) (citations omitted); *See also Armster v. United States District Court*, 806 F.2d 1347, 1352 (9th Cir. 1986). Mandamus is appropriate even though the five factors do not all point in the same direction; indeed, only rarely will both of the last two factors be present. *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984).

It is also a well recognized principle that mandamus is not a substitute for, and cannot be resorted to in civil proceedings to perform the office of, an appeal or writ of error, even when such modes of review are not available under the circumstances. *See Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964), wherein the court explained that a writ of mandamus is not to be used in a civil matter as a substitute for an appeal even though hardship and perhaps an unnecessary trial may result from the delay.

In keeping with the law of mandamus as an extraordinary, drastic remedy, to be used only when appeal is clearly an

inadequate remedy, Supreme Court Rule 20.3(a) requires a petitioner seeking a writ of mandamus to set out with particularity why the relief sought is not available in any other court. Petitioner here cannot do that and has chosen to restate only what is alleged and pending in his related appeal.

Neither may the writ of mandamus be utilized to control discretion of a lower court acting within the scope of its judicial authority. In *Schlagenhauf, supra,* the court, within the context of civil proceedings, stated that a writ of mandamus is not to be used when the most that can be claimed is that a federal district court erred in ruling on matters within its jurisdiction. Similarly, a writ of mandamus will not lie against a federal district court merely because the judge committed a reversible error in a civil trial, so long as his ruling on the question of law is made in the course of the exercise of the court's jurisdiction to decide issues properly before it. *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953).

Additionally, a motion for preliminary injunction is ancillary to an underlying cause of action, and that underlying cause of action must be commenced by complaint. Fed.R.Civ.P. 3. Where a district court has jurisdiction it may under some circumstances grant an injunction, but where there is no underlying cause of action over which the district court has primary jurisdiction, it may not entertain an application for an injunction. *Fort Worth Nat. Corp. v. Federal Savings & Loan Ins. Corp.* 469 F.2d 47, 54 (5th Cir. 1972); *Nottelson v. A.O. Smith Corp.*, 397 F.Supp. 928 (E.D. Wis. 1975). Even where a preliminary injunction is issued by the trial court, later dismissal of the complaint renders the injunction dissolved. A preliminary injunction cannot survive dismissal of a complaint. *Cyprus Barn, Inc. v. Western Electric Co.*, 812 F.2d 1363 (11th Cir. 1987); *Venezia v. Robinson,* 16 F.3d 209 (7th Cir. 1994). It would follow that after a court has dismissed a complaint, that

court has no jurisdiction to enjoin one of the parties. *Rapoport v. Banco Mexicano Somex, S.A.*, 668 F.2d 667 (2d Cir. 1982).

In short for this Court to grant a writ of mandamus and order a preliminary injunction to issue, it would first need to decide the merits of the appeal now pending before the Third Circuit Court of Appeals at 96-1225, and reverse the Order of District Court dismissing the action as a whole. Neither matter, nor its record, is before the Court and should not be. It is properly before the Third Circuit Court of Appeals, on appeal, the very existence of which appeal is reason enough to deny the writ sought by petitioner.

CONCLUSION

Petitioner cannot meet his heavy burden of proof to support the issuance of a writ of mandamus. There has been no error by either of the courts below. Petitioner has already exercised his proper remedy — his right of appeal to the Third Circuit Court of Appeals, which appeal is pending argument shortly. There is nothing in the record of that appeal pending before this Court, and no relief in that case has been requested of this Court. The underlying action to which the requested injunction would be ancillary has been dismissed and has not been reinstated by any appellate court.

The writ must be denied.

Respectfully submitted,

RICHARD K. MASTERSON
Counsel of Record
ANDREW L. BRAUNFELD
MASTERSON, BRAUNFELD,
MAGUIRE & BROWN
Attorneys for Respondents
Powell, Trachtman, Logan,
Carrle & Bowman, P.C.,
Joel P. Perilstein, and
Jonathan K. Hollin